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**NOT FOR PUBLICATION**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

9 Anna L. Davis, an unmarried woman;) No. CV-08-08104-PCT-FJM  
10 Ronald E. Gerhart and Shirley M. Gerhart,)  
11 husband and wife; Lois D. Pike, an) **ORDER**  
12 unmarried woman; Linda Schwab, an)  
13 unmarried woman; Keith R. Touw and) Connie Touw, husband and wife; Margaret)  
14 Valenta, an unmarried woman; Richard) Wasmer, an unmarried man; James Helms)  
15 and Caroline Helms, husband and wife, )  
16 Plaintiffs, )  
17 vs. )  
18 Lowe's HIW, Inc., a corporation; John) )  
19 Does I-V, Jane Does I-V, Black) )  
20 Corporations I-V, White Partnerships, I-V,) )  
Defendants. )  
\_\_\_\_\_)

22 Plaintiff homeowners bring this action against defendant Lowe's HIW, Inc. for  
23 nuisance, trespass, and negligence arising out of the construction and operation of a home  
24 improvement warehouse in Prescott, Arizona. The court has before it defendant's motion for  
25 partial summary judgment (doc. 71) and plaintiffs' response (doc. 73).

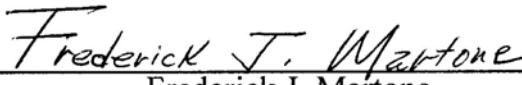
In 2007, defendant began building a Lowe's store in Prescott. Due in part to the failure of an earth wall bordering an adjacent subdivision, the construction and ensuing operation of the store subjected plaintiffs to noise, dust, and fumes. Several plaintiffs have

1 also mentioned house calls by individuals involved with the construction and trucks using  
2 a driveway to turn around. Plaintiffs seek damages and an injunction due to these events,  
3 which they claim constitute a nuisance and a trespass. They also claim injury caused by the  
4 negligent construction of the wall.

5 Defendant now moves for partial summary judgment on plaintiffs' trespass and  
6 negligence counts. It contends that plaintiffs' complaints either sound only in nuisance and  
7 not in trespass or are insubstantial. And it contends that plaintiffs cannot make out a prima  
8 facie case of negligence. Plaintiffs do not oppose defendant's motion.

9 **IT IS THEREFORE ORDERED GRANTING** defendant's motion for partial  
10 summary judgment (doc. 71). Summary judgment is granted on plaintiffs' trespass and  
11 negligence counts. Plaintiffs' nuisance count remains.

12 DATED this 18<sup>th</sup> day of November, 2009.  
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16 Frederick J. Martone  
United States District Judge  
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